IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

GLENN MAYS,	)	
	)	
Claimant Below,	)	
Appellant,	)	
	)	
v.	)	C.A. No. 08A-09-004 WCC
	)	
NVF COMPANY,	)	
	)	
Employer Below,	)	
Appellee.	)	

Submitted: February 9, 2009
Decided: May 29, 2009

OPINION

Appeal from Industrial Accident Board. AFFIRMED.

Gary S. Nitsche, P.A.; Michael B. Galbraith, Esquire; 1300 N. Grant Avenue, Suite 101, P.O. Box 2324, Wilmington, DE 19899. Attorneys for Claimant Below, Appellant.

Eric D. Boyle, Esquire, Three Mill Road, Suite 301, Wilmington, DE 19806. Attorney for Employer Below, Appellee.

CARPENTER, J.

Introduction

Before this Court is Glenn Mays's (the "Appellant") appeal of the Industrial Accident Board's ("IAB" or the "Board") decision, which denied in part his Petition to Determine Compensation Due by apportioning his award.[1] Upon review of the record in this matter, the Court finds substantial evidence to support the Board's decision and therefore, the Board's decision is AFFIRMED.

Facts

The Appellant is a former employee of NVF Company (the "Employer"). He was involved in two work-related accidents. In January of 2004 the Appellant injured his upper extremity when he slipped on a catwalk and hyper-extended his left shoulder. In April of 2004 the Appellant injured his lumbar spine when he was maneuvering 725-pound barrels in an evaporator, and attempted to prevent one from rolling away. Following the January 2004 accident, the Appellant had shoulder surgery that involved reshaping the shoulder joint with anchors and screws.

Dr. Stephen Rodgers, an occupational medicine specialist, examined the Appellant in May 2006 and July 2007, and testified on his behalf. Dr. Rodgers stated that the Appellant had a 17% permanent impairment of his lumbar spine and a 15% permanent impairment of his upper left extremity.

[1]The parties stipulated that the decision of the Hearing Officer would support the decision of the Board pursuant to 19 *Del. C.* § 2301B(a)(4). To avoid confusion, the Court will reference this decision as that of the Board's.

The Appellant had also visited Dr. Rodgers in 1997 and 1999 for prior back injuries. After the first hearing, the Employer was allowed to re-open the matter because of newly discovered evidence based upon Dr. Rodgers's testimony. As a result, the Employer submitted evidence of a permanency report that Dr. Rodgers prepared in July of 1999 stating that the Appellant had a 10% permanent impairment of his lower back due to a prior work accident. Dr. Rodgers had testified at the previous hearing that any prior permanent impairment to his lower back would reduce the 17% permanent impairment estimate attributed to the April 2004 injury.

Dr. Elliott H. Leitman, MD, is an orthopedic surgeon specializing in knee and shoulder joints. He testified on behalf of the Employer after examining the Appellant in January and July of 2005, and July 2007, as well as reviewing the Appellant's medical records. Dr. Leitman did not believe the Appellant had any permanent impairment of his shoulder, but agreed with Dr. Rodgers's assessment that there was a 17% permanent impairment of the Appellant's lower back. He also agreed that a prior permanent impairment rating would reduce the current rating.

The Board initially concluded that the Appellant had a 15% permanent impairment to his upper extremity, but reserved judgment on the lumbar spine award due to the Employer's Motion to Re-Open the Hearing based on newly discovered evidence (Dr. Rodgers's 1999 prior permanent impairment rating). In a subsequent

"amendment", the Board concluded that the Appellant had a 7% permanent impairment to his lumbar spine. The Board arrived at this figure by subtracting 10% (the prior rating) from 17% (the current rating). Thus, the Board granted the Appellant's petition, although it apportioned the lumbar spine award based on Dr. Rodgers's prior permanent impairment rating of the previous injury. The Appellant now appeals the Board's decision as to the lumbar spine injury, arguing that apportionment of the award was improper. Specifically, the Appellant asserts the following arguments: (1) the Board erred as a matter of law because it violated 19 *Del. C.* § 2347 as no prior permanent impairment award had been issued based on the prior injury; (2) there is insufficient evidence to support the Board's conclusion that the Appellant has a 7% permanent impairment of his lumbar spine; and (3) there is insufficient evidence to support the Board's apportionment of the experts' rating of 17% because "the Board did not consider the appropriate basis for deducting the alleged 10% prior impairment."

Standard of Review

This Court's role in reviewing an appeal from an administrative agency is limited.[2] The Court will only evaluate the record, in the light most favorable to the prevailing party below, to determine if substantial evidence existed to reasonably

[2] *Zicarelli v. Boscov's Dep't Store, LLC*, 2008 WL 3486207, at *2 (Del. Super. June 5, 2008).

support the Board's conclusion and to ensure that it is free from legal error.[3] "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[4] Thus, the Court does not address issues of credibility, nor does it independently weigh the evidence presented to the Board.[5] If the record supports the Board's findings, the Court must accept those findings even if the Court might have reached a different conclusion based on the facts presented.[6]

Discussion

The question before the Court is whether the Board had substantial evidence to apportion the Appellant's award and to find that the Appellant had a 7% permanent impairment to his lumbar spine.

The Appellant first claims that the Board's decision was erroneous as a matter of law because the Board violated 19 *Del. C.* § 2347. Section 2347 permits the Board to modify any agreement or award of workers' compensation benefits:

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[3] *Id.*

[4] *Del. Alcoholic Beverage Control Comm'n v. Newsome*, 690 A.2d 906, 910 (Del. 1996) (citing *Oceanport Ind., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994)).

[5] *Michael A. Sinclair, Inc. v. Riley*, 2004 WL 1731140, at *2 (Del. Super. July 30, 2004) (citing *Unemployment Ins. App. Bd. v. Div. of Unemployment Ins.*, 803 A.2d 937 (Del. 2002)).

[6] *Anderson v. Comfort Suites*, 2004 WL 304359, at * 2 (Del. Super. Feb. 12, 2004) (explaining that "[a]bsent an abuse of discretion, this Court must uphold the Board's decision.") (citing *Oceanport Ind., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994)).

> On the application of any party in interest on the ground that the incapacity of the injured employee has subsequently terminated, increased, diminished or recurred or that the status of the dependent has changed, the Board may at any time, but not oftener than once in 6 months, review any agreement or award.
>
> On such review, the board may make an award ending, diminishing, increasing or renewing the compensation previously agreed upon or awarded, and designating the persons entitled thereto, subject to this chapter, and shall state its conclusions of facts and rulings of law.[7]

However, this section only applies where a prior award or agreement has been entered. The Appellant incorrectly reads this section as requiring the entry of a prior award of compensation before apportionment of a permanent impairment rating can occur. Here, there was no previous award of compensation, nor was there any agreement as to any compensation, thus this section is inapplicable to the case at bar. Dr. Rodgers simply prepared a report in 1999 indicating a permanent impairment rating of 10%, and it appears that the Appellant did not seek any workers' compensation benefits for that injury. As such, the present decision is simply the Board's initial determination of benefits and its determination of the degree of permanency that can be attributed to the 2004 accidents. The fact that the Appellant did not seek benefits previously does not prevent the Board from apportioning the award.

[7] 19 *Del. C.* § 2347 (2009).

The Appellant also argues that there is insufficient evidence to support the Board's conclusion that the Appellant sustained only a 7% permanent impairment to his lumbar spine. He makes three arguments in support of this: (1) the Board failed to articulate a factual basis for setting a permanency rating different from Dr. Rodgers's recommendation, (2) the Board should have considered expert testimony addressing the issue of apportioning the two permanency ratings, and (3) the Board did not consider the appropriate basis for apportioning the award.

First, the Board did have a basis for adjusting Dr. Rodgers's rating as there was statutory support for their position and Dr. Rodgers's testimony provided a factual basis for the adjustment. Under Delaware law, an employer may be required to compensate an employee for a work-related injury that occurs subsequent to a prior, related injury.

> Whenever a subsequent permanent injury occurs to an employee who has previously sustained a permanent injury, from any cause, whether in line of employment or otherwise, the employer for whom such injured employee was working at the time of such subsequent injury shall be required to pay only that amount of compensation as would be due for such subsequent injury without regard to the effect of the prior injury.[8]

The Court appreciates that this statutory section does not apply where the "previously sustained permanent injury" is a degenerative condition related to the

[8] 19 *Del. C.* § 2327(a) (2009).

aging process and apportionment of a permanent impairment rating only occurs where a specific and identifiable work accident aggravates a pre-existing non-degenerative condition (i.e., a prior injury). [9] Further, the Board properly distinguished this case from *Sewell v. Delaware River & Bay Authority*,[10] where the Claimant sustained a work-related injury that exacerbated a pre-existing latent condition. Here, there is no latent condition that became symptomatic due to the work injury. Rather, the Appellant here sustained a prior injury to his lower back in 1999 that was the result of a work accident. Thus, because the Appellant's prior injury was neither latent nor non-degenerative, the Employer is liable for "only that amount of compensation as would be due for such subsequent injury without regard to the effect of the prior injury."

Second, the Appellant argues that the Board should have heard additional expert testimony on the issue of apportionment. The Court finds some credibility to this argument since fairness would dictate, at a minimum, that counsel be allowed to question Dr. Rodgers about his prior decision and its relationship to his present opinion. This would provide the Board with the opportunity to assess the credibility of the doctor's testimony and its relationship to the Appellant's past condition.

[9] *State v. Harris*, 2004 WL26859, at *3 (Del. Super. Jan. 6, 2004) (quoting *Sewell v. Del. River & Bay Auth.*, 796 A.2d 655, 663-64 (Del. Super. 2000)).

[10] 796 A.2d 655 (Del. Super. 2000).

Without such evidence, the Board is simply presented with a report that could be based on a different standard or is not representative of the doctor's present opinion. As such, the most appropriate course once this report was discovered was to call Dr. Rodgers for additional questions and, if appropriate, allow additional witnesses on the issues to be present. The problem here is that once the Board received Dr. Rodgers's 1999 report, it appears they inquired of counsel as to how they wished the Board to proceed. Instead of requesting an opportunity to present additional evidence, or to further question Dr. Rodgers, counsel for the Appellant in a letter dated May 9, 2008 simply ended his letter with the statement "I am requesting that the hearing officer finalize her decision on the [low back] issue and attorney fees."

It is difficult for this Court to now reverse the Board's decision when counsel never requested, when given the opportunity, to present additional evidence or to further examine the doctor or even to assert that the prior opinion was faulted because the doctor used a different edition of the AMA guidelines. At best, these arguments are after-the-fact thoughts made in an attempt to convince the Court they warrant reversal of the Board's decision even though these arguments were never presented to the Hearing Officer. The Court, however, finds that the Appellant waived the presentation of additional evidence on the apportionment issue and cannot now argue that the Board committed error by failing to *sua sponte* require it to be provided. All

the Board was required to do was to provide to the Appellant the opportunity to challenge the "new" evidence. Since he failed to take advantage of the opportunity, he cannot in hindsight complain.

Conclusion

Considering all of these factors, the Court finds that there is sufficient support in the record for the Board's decision that the Appellant had a 7% permanent impairment to his lumbar spine. For the foregoing reasons, the decision of the Board is AFFIRMED.

IT IS SO ORDERED

Judge William C. Carpenter, Jr.